BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRANDON SLIFE Claimant VS. **PROPAK CORPORATION** Respondent AND **CHARTER OAK FIRE INSURANCE** Insurance Carrier	)	Docket No. 1,039,973
BRANDON SLIFE Claimant VS. **PROPAK CORPORATION** Respondent AND **TRAVELERS INSURANCE** Insurance Carrier	)	Docket No. 1,040,885

ORDER

Respondent and its insurance carrier[1] request review of the October 9, 2008 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore (ALJ).

[1] According to the record, Travelers owns Charter Oak Fire Insurance company and therefore, they will be referred to singularly as "carrier", although the Division's file indicates each company insures respondent for each alleged date of accident.

ISSUES

This claim involves two separate claimed dates of accidents, both for the same employer and involving the same parts of the body, specifically the right arm, shoulder and neck. Docket No. 1,039,973 is a claim for repetitive injuries to the claimant's right arm, shoulder and neck, which claimant attributes to his work for respondent with date of accident of April 16, 2007, the date written claim for compensation was purportedly hand delivered to respondent. Respondent denies every aspect of compensability related to this claim. Not only does respondent deny claimant was injured while in its employ, respondent denies notice and timely written claim.

Docket No. 1,040,885 is identical in reference to the injured body parts, but this accident stems from an acute injury on February 27, 2008, when a pallet fell from a stack causing claimant to twist his right upper extremity and neck when reaching for the pallet with his right upper extremity. Respondent again denies claimant suffered injury in this event. Alternatively, respondent contends, based upon Dr. Do's report, that if claimant was injured his injury was temporary at best and/or attributable to his earlier non-compensable injury.

The ALJ expressed "grave concerns" over the claimant's credibility and that of his wife. He even noted that claimant and his wife "will apparently say whatever it takes to support a claim for compensation."[2] He went on to conclude that "[c]laimant failed to give timely notice and written claim in Docket No. 1,039,973."[3] However, after considering all of the evidence, the ALJ made the following findings and conclusions:

> Under these circumstances, the court is confronted with a [c]laimant with virtually non-existent credibility, but with objective evidence of injuries that could have resulted from his work duties, and with medical support for that attribution. The court will find, for preliminary hearing purposes, that claimant has sustained his burden of proof of a series of accidental injuries, arising out of and in the course of his employment, culminating with a specific event on February 27, 2008.[4]

The respondent and carrier request review of whether claimant established that his injury arose out of and in the course of his employment either a series of accidents or an

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[2] ALJ Order (Oct. 9, 2008) at 7.

[3] *Id.* 2.

[4] *Id.* at 7. The ALJ further noted that "[w]hile there may be an issue as to whether [c]laimant's current need for treatment derives from the April 17, 2007 [sic] accident as opposed to the February 8, 2008 [sic] accident, that issue is deferred pending the rendition of medical treatment and a more fully-developed opinion on causation." *Id.* at 2.

acute injury on February 27, 2008. In addition, respondent specifically denies that any acute accident occurred on February 27, 2008, asserting that any injury that might have resulted was caused by claimant's earlier alleged accident (which it contends is not compensable for claimant's timeliness failures both as to notice and written claim). Finally, respondent argues that the ALJ exceeded his jurisdiction by incorrectly redefining claimant's February 27, 2008 accident as a series of injuries. Based upon these arguments, respondent contends that the ALJ should be reversed, thereby denying benefits for both dates of alleged accidents.

Claimant argues that the ALJ should be affirmed, arguing that the testimony of claimant and his wife, along with the contemporaneous medical records support his claim, regardless of whether the Board considers this a single acute injury, a series or some sort of hybrid (as the ALJ did).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

The ALJ's Order sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. This member of the Board adopts the findings and conclusions of the ALJ as her own as if specifically set forth herein except as hereinafter noted.

The facts surrounding these two claims are rather lengthy. Suffice it to say, claimant alleges two separate accidents, one a series (for which he says he gave written notice on April 16, 2007) and a second, an acute injury. Claimant and his wife have one version of events and respondent's representatives have an altogether different version. In reviewing the record it is clear that the ALJ's jaundiced view of the claimant's credibility and that of his wife is well founded. On many critical issues their testimony is vague and obviously inconsistent. This Board Member agrees that claimant's recitation of events simply does not ring true as it relates to notice of his alleged injury on April 16, 2007. For example, claimant maintains that he attempted to give notice of his ongoing neck, shoulder and arm complaints, but that his written notice of injury was rejected and that he was told that if a claim would be filed, his supervisor would be made to counsel him and eventually fire claimant. Yet, in this very same time period claimant suffered another work-related injury to his wrist (on April 13, 2007), treatment was provided and the claim was handled without incident. And claimant was not fired as a result of that accident.

In another area of his testimony, claimant asserted that his first incidence of shoulder pain presented in January 2007. He also denied any previous medical treatment. Yet, the records establish that by January 2007 claimant had been taking Lortab pain killers for over eight months.

Like the ALJ, this Board Member finds claimant's wife's testimony less than reliable. She is vague as to many details but then becomes adamant about certain facts, like the identity of claimant's manager at various points of his employment and her preference for one over another and his willingness to address claimant's physical complaints.

There is medical evidence to support both claimant and respondent in this matter. Dr. Murati examined claimant at his attorney's request. It appears as though Dr. Murati was not told of the acute injury of February 27, 2008 or that he had access to all of claimant's medical records. Nonetheless, he opined that all of claimant's current problems are related to a series of accidents from January 2007 through April 13, 2007 along with an aggravation on June 27, 2007 [sic].[5] At respondent's request Dr. Do examined claimant and concluded that claimant's need for treatment is due to the onset of pain in January of 2007, when claimant first voiced his "severe" pain complaints. Finally, like the ALJ, this Board Member finds the lack of contemporaneous medical records curious.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[6] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[7]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[8]

This Board Member has reviewed the entire record, insofar as it has been developed and concludes the ALJ's Order should be modified. Claimant has been employed by respondent since late 2006 working at a job that is, by all accounts, upper extremity intensive, fast paced and heavy in nature. It is easy to conclude that this is a repetitive job. Claimant first noticed pain in his shoulder in January 2007. But like the ALJ, this Board Member does not believe the claimant's assertions that he voiced those complaints to Rick Winter nor that the April 16, 2007 discussion about claimant's ongoing pain complaints between claimant, his wife and Mr. Winter occurred. But under these facts, that conclusion does not necessarily defeat claimant's claim.

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[5] P.H. Trans., Ex. 1 at 4 (Dr. Murati's June 16, 2008 report).

[6] K.S.A. 44-501(a).

[7] K.S.A. 44-508(g).

[8] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

Inasmuch as claimant has alleged a series of accidents, the finder of fact must determine the appropriate date of accident for purposes of determining whether timely notice of claim and written claim have been satisfied. The ALJ correctly noted that under K.S.A. 44-508(d), the theoretical date of accident is a claimed series of injuries is the earlier of the following dates: "(1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker."

Here, claimant alleges that he attempted to give written notice of his series of injuries on April 16, 2007, but like the ALJ, this Board Member does not find that assertion credible. Claimant continued to work at this job, performing the same tasks and continued to do so until the date if his acute injury, February 27, 2008, and after, until he was terminated in August 2008. Because claimant continued to do his job, even after he acute injury which forms the basis for his second claim, his first claim had yet to accrue under the terms of K.S.A. 44-508(d).

The Division's file indicates that claimant's counsel served a copy of his accident report as well as an application for hearing and demand for compensation on March 19, 2008. His application for hearing was filed April 30, 2008, alleging a series of accidents beginning in January 2007. This member finds that for purposes of determining the timeliness of his notice and written claim, claimant's legal date of accident occurred on March 19, 2008, the date he served written notice of his claim upon respondent. Thus, the claim is timely. For this reason, the ALJ's decision with respect to the lack of timeliness of notice and written claim in Docket No. 1,039,973 is reversed.[9]

Although respondent maintains the ALJ went "beyond his jurisdiction in redefining the claims for claimant"[10] and will most certainly believe that same has been done here, this Board Member disagrees. The date of accident is a legal fiction used in workers compensation to determine a variety of issues. And while in acute injuries that date is normally easy to determine, in repetitive injury cases that date is rarely an easy conclusion to make. Claimant's testimony, while vague and inconsistent with respect to the notice and past medical treatment issues, is consistent and uncontroverted with respect to his ongoing work duties. And the medical records (what exist in the record) do confirm a causal

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[9] In the ALJ's Order he denied compensability in Docket No. 1,039,973, but later on in the Order refused to decide whether claimant's current need for treatment was due to that first accident (which he found was *not* compensable) or due to the second acute injury reflected in Docket No. 1,040,885. If Docket No. 1,039,973 is not compensable then no medical treatment is owed in that claim and thus, the determination of whether the medical treatment is casually related to that claim is crucial and should not have been deferred. In essence, the ALJ failed to make a determination of a fundamental issue. However, given the decision of this Board Member that renders the first docketed claim compensable, this issue is moot.

[10] Respondent's Brief at 10 (filed Nov. 13, 2008).

connection between his ongoing work activities and the corresponding shoulder pain complaints.

As for Docket No. 1,040,885, this Board Member finds the ALJ's factual and legal conclusions as they relate to that claim are affirmed. Claimant is found to have sustained a single acute injury to his upper extremity on February 27, 2008. However, that accident is included within the series covered by Docket No. 1,039,973. As the evidence is developed, the ALJ will be better positioned to determine what medical treatment and permanency is needed, if any, due to the acute injury versus the series of injuries.

In summary, this Board Member finds that the claimant established a compensable injury in both docketed claims, with the first claim being a series of repetitive injuries that spans the date of his acute injury on February 27, 2008.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[11] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated October 9, 2008, is modified in part and affirmed in part.

IT IS SO ORDERED.

Dated this _____ day of January 2009.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Andrew L. Oswald, Attorney for Claimant
Ali N. Marchant, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

[11] K.S.A. 44-534a.